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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Nicole Cox,

10 Plaintiff,

11 v.

12 Global Tool Supply LLC, et al.,

13 Defendants.
14

No. CV-20-00152-PHX-GMS

ORDER

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16 Pending before the Court is Defendants Global Tool Supply LLC (“Global Tool”) and Bill Rozakis (“Rozakis”) (collectively, “Defendants”)’ Motion to Dismiss. (Doc. 20.)
17 For the following reasons, the Motion is granted in part and denied in part.
18

19 **BACKGROUND**

20 Plaintiff Nicole Cox was formerly employed by Global Tool as a part-time
21 receptionist. While working at Global Tool Plaintiff claims to have been subjected to
22 explicit and inappropriate comments by her supervisor Rozakis. For example, on at least
23 one occasion, Rozakis asked Plaintiff to be his “sugar baby.” Plaintiff alleges she was
24 forced to quit because she no longer felt comfortable going into the office. Plaintiff brings
25 this suit alleging violations of Title VII of the Civil Rights Act of 1964 (Count I) and the
26 Arizona Civil Rights Act (Count II). She also brings claims of constructive discharge
27 (Count III) and intentional infliction of emotional distress (Count IV). Defendants move to
28 dismiss Plaintiff’s Arizona Civil Rights Act and constructive discharge claims as untimely

1 and further argue that Plaintiff failed to adequately allege sufficient facts to state a claim
2 under Title VII or for intentional infliction of emotional distress.

3 Notably, Defendants previously filed a motion to dismiss with this Court that was
4 dismissed for failure to comply with the conferral requirements of LRCiv 12.1(c). While
5 the parties dispute whether the requirements imposed by LRCiv 12.1(c) were satisfied with
6 respect to the present motion, they seem to agree that at least some conversation regarding
7 this Motion took place before this Motion was filed. Thus, the Court will address this
8 Motion on its merits.

9 DISCUSSION

10 I. Legal Standard

11 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil
12 Procedure 12(b)(6), a complaint must contain more than a “formulaic recitation of the
13 elements of a cause of action”; it must contain factual allegations sufficient to “raise the
14 right of relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
15 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). When analyzing a complaint
16 for failure to state a claim, “allegations of material fact are taken as true and construed in
17 the light most favorable to the non-moving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217
18 (9th Cir. 1996). However, legal conclusions couched as factual allegations are not given a
19 presumption of truthfulness, and “conclusory allegations of law and unwarranted
20 inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. F.D.I.C.*, 139 F.3d
21 696, 699 (9th Cir. 1998).

22 II. Analysis

23 A. Title VII

24 Defendants argue that Plaintiff’s claim under Title VII fails as a matter of law
25 because she failed to allege that either of the Defendants fall within the statutory definition
26 of an “employer”—an essential element of her claim. For purposes of Title VII, an
27 employer is defined as a “a person engaged in an industry affecting commerce who has
28 fifteen or more employees for each working day in each of twenty or more calendar weeks

1 in the current or preceding calendar year, and any agent of such a person . . .” 42 U.S.C.
 2 § 2000e(b). Plaintiff does not dispute that she failed to allege that Defendants had fifteen
 3 or more employees; instead, she claims that she is “not required to state every fact in her
 4 complaint.” (Doc. 21 at 7.) She further asserts that alleging Title VII “makes it ‘an unlawful
 5 employment practice for an employer’ to ‘discriminate against any individual . . . because
 6 of such individual’s . . . sex,’” (Doc.1 at 5), sufficiently pleads the applicability of Title
 7 VII. Contrary to Plaintiff’s assertion, failing to plead the employee numerosity requirement
 8 is grounds for dismissal. *See Carey v. Local 612 Int’l Union of Operating Engineers*, 210
 9 Fed. Appx. 564, 565 (9th Cir. 2006) (affirming the dismissal of the plaintiff’s ADA claim
 10 for failing to allege that her employer had fifteen or more employees); *c.f. Hadley v. Stout*,
 11 No. CV-14-08205-PCT-SRB, 2015 WL 12941878, at *3 (D. Ariz. Apr. 13, 2015)
 12 (explaining that a pro se plaintiff sufficiently plead a claim under the ADA when she relied
 13 on the ADA *and* alleged that her employer employed twenty-six employees).¹ As a result,
 14 Plaintiff’s Title VII claim (Count One) is dismissed.

15 **B. Arizona Civil Rights Act**

16 Defendants next argue that Plaintiff’s claim under the Arizona Civil Rights Act is
 17 untimely. As a prerequisite to bringing suit, A.R.S. § 41-1481 requires a plaintiff to file a
 18 charge with the EEOC and/or Arizona Attorney General “within 180 days after the alleged
 19 unlawful employment practice occurred.” Failure to timely comply with A.R.S. § 41-1481
 20 bars the claim. *See Ornelas v. Scoa Indus., Inc.*, 120 Ariz. 547, 548, 587 P.2d 266, 267 (Ct.
 21 App. 1978). Federal law similarly demands that a prospective plaintiff file a charge with
 22 the EEOC within 180 days of the alleged unlawful employment practice. 42 U.S.C.
 23 § 2000e-5(e)(1). This deadline, however, is extended to 300 days in deferral states, like
 24 Arizona, if the proceedings are initially instituted with the state agency. *Id.*

25 The parties do not dispute that Plaintiff filed the required charge 222 days after the
 26 alleged unlawful employment practice. Plaintiff argues that the charge was timely filed

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 28 ¹ This Court has recognized that the pleading standards for the ADA and Title VII
 employee numerosity requirements inform each other. *Hadley v. Stout*, No. CV-14-08205-
 PCT-SRB, 2015 WL 12941877, at *3 (D. Ariz. Feb. 24, 2015) (collecting cases).

1 because Arizona is a deferral state resulting in an operative filing period of 300 days.
2 Plaintiff relies on *Rush-Shaw v. USF Reddaway, Inc.*, No. CV-12-0941-PHX-JAT, 2013
3 WL 3455723, at *3 (D. Ariz. July 9, 2013) to support her argument. However, unlike
4 Plaintiff, who brings both state and federal discrimination claims, the plaintiff in *Rush-*
5 *Shaw* brought only a federal claim. The parties agree that Arizona’s status as a deferral
6 state extends the deadline to file a charge *for federal claims* to 300 days. *See E.E.O.C. v.*
7 *Commercial Office Prod. Co.*, 486 U.S. 107, 123–25 (1988) (holding that, in deferral states,
8 late filing with the state does not bar a plaintiff from timely filing their federal claim within
9 the extended 300-day period). Plaintiff, however, fails to provide any authority suggesting
10 that Arizona’s status as a deferral state has any impact on Arizona’s 180-day deadline for
11 state law claims. *See Id.* (distinguishing between the state and federal filing periods in
12 deferral states). As a result, Plaintiff’s Arizona Civil Rights Act claim (Count II) is
13 untimely.

14 “Under equitable tolling, plaintiffs may sue after the statutory time period for filing
15 a complaint has expired if they have been prevented from filing in a timely manner due to
16 sufficiently inequitable circumstances.” *McCloud v. State, Ariz. Dep’t of Pub. Safety*, 217
17 Ariz. 82, 87, 170 P.3d 691, 697 (Ct. App. 2007). However, the facts necessary to support
18 equitable tolling must be alleged in the complaint. *Ranch Realty, Inc. v. DC Ranch Realty,*
19 *LLC*, 614 F. Supp. 2d 983, 987 (D. Ariz. 2007) (“A court may not look beyond the
20 complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a
21 defendant’s motion to dismiss.”) (quoting *Schneider v. California Dept. of Corrections*,
22 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). Plaintiff’s complaint is devoid of any such
23 allegations. To the extent Plaintiff provides an explanation for her delay, it is raised for the
24 first time in her response to Defendants’ motion. As a result, Plaintiff has not alleged
25 sufficient facts to warrant equitable tolling of her claim. However, Plaintiff’s state law
26 claim is dismissed without prejudice to provide Plaintiff the opportunity to adequately
27 plead her “inequitable circumstances” to the extent they existed.

1 **C. Constructive Discharge**

2 Under Arizona law, the statute of limitations for a constructive discharge claim
 3 under A.R.S. § 23-1502 is one year from the date on which the cause of action accrues. *See*
 4 A.R.S. § 12-541(5). “[A] plaintiff’s cause of action does not accrue until the plaintiff knows
 5 or, in the exercise of reasonable diligence, should know the facts of the underlying the
 6 cause.” *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588,
 7 898 P.2d 964, 966 (1995). The pertinent facts for accrual are the “what and who elements
 8 of causation.” *Lawhon v. L.B.J. Institutional Supply, Inc.*, 159 Ariz. 179, 183, 765 P.2d
 9 1003, 1007 (Ct. App. 1988).

10 Plaintiff alleged to have quit her job on October 31, 2018 as a direct consequence
 11 of Rozakis’ alleged conduct. It is not disputed that Plaintiff was aware of the facts
 12 underlying her constructive discharge claim by the date of her resignation. As a result,
 13 Plaintiff had until November 1, 2019 to bring her claim within the appropriate statute of
 14 limitations. Because her complaint was not filed until January 21, 2020, her claim is
 15 untimely. Again, Plaintiff fails to provide any allegations or authority warranting the tolling
 16 of her claim. Accordingly, Count III is dismissed.

17 **D. Intentional Infliction of Emotional Distress**

18 To state a claim for intentional infliction of emotional distress (“IIED”) Plaintiff
 19 must allege, among other things, that Defendant Rozakis’ conduct was “so outrageous in
 20 character and so extreme in degree, as to go beyond all possible bounds of decency.” *Cluff*
 21 *v. Farmers Ins. Exchange*, 10 Ariz. App. 560, 562, 460 P.2d 666, 668 (1969). Plaintiff
 22 alleges that Rozakis intentionally caused Plaintiff emotional distress by inviting her to be
 23 his “sugar baby,” regularly making inappropriate comments regarding his sex life, and
 24 making racial slurs. Plaintiff further alleges that as a direct result of Rozakis’ alleged
 25 conduct, she felt so “distraught” that she quit her job and experienced emotional
 26 breakdowns.

27 Rozakis asserts that these allegations, even accepted as true, simply fail to constitute
 28 extreme or outrageous conduct. Rozakis, however, has not cited any cases that determine,

1 at the motion to dismiss stage, that allegations of sexually harassing conduct are
 2 insufficient to state a claim of IIED. Absent clear authority to the contrary, the Court
 3 concludes that a reasonable mind could determine that the alleged conduct is sufficiently
 4 outrageous to state a claim for IIED. Because Plaintiff has alleged sufficient facts to satisfy
 5 the notice pleading standard of Rule 8, Defendants' Motion to Dismiss Plaintiff's IIED
 6 claim is denied.

7 **E. Alter Ego Liability**

8 Plaintiff seems to allege that Global Tool's liability, if any, should extend to Rozakis
 9 through alter ego liability. However, the only remaining claim, Count IV, appears to be
 10 asserted against Rozakis in his individual capacity. Thus, the Court need not reach
 11 Defendants' argument that Plaintiff failed to adequately plead this theory of liability.

12 **F. Attorneys' Fees**

13 Because Plaintiff's federal and state law harassment claims are dismissed,
 14 Defendants also request attorneys' fees as the prevailing party pursuant to 42 U.S.C.
 15 § 2000e-5(k) and A.R.S. § 41-1481(J). Attorneys' fees awards to prevailing defendants on
 16 claims under Title VII and ARS § 41-1481 are governed by the same standard—the court
 17 may award attorney fees only if it finds that the plaintiff's action was frivolous,
 18 unreasonable, or without foundation. *Harris v. Maricopa County Superior Court*, 631 F.3d
 19 963, 971 (9th Cir. 2011). Finding Plaintiff's claims, though untimely, not frivolous or
 20 unreasonable, the Court declines to award Defendants attorneys' fees.

21 **CONCLUSION**

22 Plaintiff's Arizona Civil Rights Act (Count II) and constructive discharge claim
 23 (Count III) are dismissed as untimely. Plaintiff's Title VII claim (Count I) is similarly
 24 dismissed for failure to allege the employee-numerosity element of her claim. All
 25 dismissed claims are dismissed without prejudice. Plaintiff has, however, sufficiently
 26 alleged a claim against Defendant Rozakis for IIED (Count IV). Accordingly,

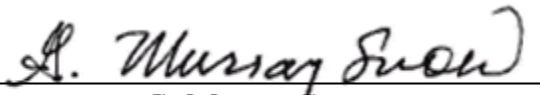
27 **IT IS HEREBY ORDERED** that Defendants Global Tool Supply LLC and Bill
 28 Rozakis' Motion to Dismiss (Doc. 20) is **GRANTED** in part and **DENIED** in part as

1 follows:

2 1. Counts One, Two, and Three of the Complaint (Doc. 1) are dismissed against
3 both Defendants without prejudice.

4 2. Defendants' Motion is denied with respect to Count IV.

5 Dated this 4th day of August, 2020.

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8 G. Murray Snow
9 Chief United States District Judge
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